Filed 5/20/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VICTOR MACIEL GARCIA, Defendant and Appellant.	F042317 (Super. Ct. No. 1042450) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. John E. Griffin, Jr., Judge.

Philip M. Brooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Robert P. Whitlock and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 1 and 3.

FACTUAL AND PROCEDURAL BACKGROUND

Two eyewitnesses identified 17-year-old Victor Maciel Garcia as the person who fired several shotgun blasts during a gang altercation in an alley. A pellet from one of those blasts apparently hit a 12-year-old girl in the leg and caused slight bleeding. An information charged him with, inter alia, attempted willful, deliberate, and premeditated murder and assault with a firearm and included, inter alia, criminal street gang, personal firearm use, and personal and intentional firearm discharge allegations. (Pen. Code, §§ 664/187, subd. (a), 245, subd. (a)(2), 186.22, subd. (b)(1), 12022.5, subd. (a)(1), 12022.53, subd. (c).[1]) A jury found him guilty of those crimes and found those allegations true.

Before sentencing, Garcia requested a transfer from criminal court to juvenile court on the ground that at the preliminary hearing the magistrate did not find reasonable cause to believe he was subject to the discretionary direct file provisions of Proposition 21.[2] (Welf. & Inst. Code, § 707, subd. (d)(4).[3]) In opposition, the prosecutor argued that Garcia waived any jurisdictional irregularity by failing to object and, in the alternative, that the magistrate's findings of probable cause to believe he committed offenses authorizing a Proposition 21 discretionary direct file were equivalent to the

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[1] Later statutory amendments made nonsubstantive changes to both firearm enhancement statutes. (Stats. 2003, ch. 468, § 22; Stats. 2002, ch. 126, §§ 3, 4.)

[2] See the Gang Violence and Juvenile Crime Prevention Act of 1998. (Initiative Measure, Ballot Pamp., Primary Elec. (Mar. 7, 2000) (Proposition 21).)

[3] Welfare & Institutions Code, § 707, subdivision (d)(4): "In any case in which the district attorney or other appropriate prosecuting officer has filed an accusatory pleading against a minor in a court of criminal jurisdiction pursuant to the provisions of this subdivision, the case shall then proceed according to the laws applicable to a criminal case. In conjunction with the preliminary hearing as provided for in Section 738 of the Penal Code, the magistrate shall make a finding that reasonable cause exists to believe that the minor comes within the provisions of this subdivision. If reasonable cause is not established, the criminal court shall transfer the case to the juvenile court having jurisdiction over the matter."

missing finding. (Pen. Code, §§ 664/187, subd. (a), 245, subd. (a)(2), 186.22, subd. (b)(1); Welf. & Inst. Code, § 707, subds. (b)(12), (b)(13), (d)(2)(C)(ii).) The court denied the request.[4]

The court sentenced Garcia to an aggregate 45-to-life term in state prison – 15-to-life for attempted willful, deliberate, and premeditated murder consecutive to 20 years for the personal and intentional firearm discharge enhancement and 10 years for the criminal street gang enhancement – and stayed all other terms. Later, the court recalled the sentence and held a hearing on Garcia's request for a juvenile disposition. (Pen. Code, §§ 1170, subd. (d), 1170.19, subd. (a)(4); Welf. & Inst. Code, § 707, subd. (d)(6).)

At the hearing, the court characterized as "kind of a long sentence for somebody [his] age" Garcia's 45-to-life term, as "[p]robably" acceptable the 18-year term his counsel had tried to no avail to negotiate, and as inappropriate the notion "he be released at the time he's 25 years, in seven years." The court noted that Garcia returned to the United States after his deportation because "he liked the lifestyle of the gang," that he increased his involvement in illegal gang activities after his return, and that he even shot at someone "to prove he was faithful to the gang." On that record, the court imposed the identical adult sentence as before to send the message that having "the younger people pull the trigger" leads to no less harsh punishment than if "the 22-year-old gang members" pull the trigger.

DISCUSSION

1. *Present Recollection Refreshed*[*]

On the premise the court's ruling denying his counsel permission to refresh the recollection of a witness was error, Garcia argues the error violated the confrontation clause. The Attorney General disputes the premise and argues the contrary.

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[4] That ruling is not at issue on appeal.

[*] See footnote, *ante*, page 1.

At trial, two witnesses testified Garcia was the person who fired the shotgun. On cross-examination of one of those witnesses, Garcia's counsel asked if she remembered talking with an officer the night of the shooting. She answered in the affirmative. He asked if she told the officer she was "unable to describe the suspects." She replied, "No, I never stated that." The following colloquy ensued:

> "[DEFENSE COUNSEL]: Q. If I were to show you a portion of [the officer's] report, would that refresh your recollection?
>
> "[PROSECUTOR]: Objection. Hearsay.
>
> "THE COURT: Sustained.
>
> "[DEFENSE COUNSEL]: Pardon?
>
> "THE COURT: Sustained.
>
> "[PROSECUTOR]: It's hearsay.
>
> "[DEFENSE COUNSEL]: I'm just asking if it would refresh her recollection.
>
> "THE COURT: She didn't prepare the report.
>
> "[DEFENSE COUNSEL]: Pardon?
>
> "THE COURT: She didn't prepare the report.
>
> "[DEFENSE COUNSEL]: I wasn't asking to publish it to the jury. I just wanted to see if it refreshed her recollection regarding her conversation to [the officer].
>
> "[PROSECUTOR]: You may ask her about that but not about the –
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> "THE COURT: No response.
>
> "[PROSECUTOR]: Sorry, Your Honor.
>
> "[DEFENSE COUNSEL]: Q. If you were to view a portion of [the officer's] report regarding the conversation he had with you, would that refresh your recollection?
>
> "[PROSECUTOR]: Objection. Hearsay.

"THE COURT: I don't think you can impeach a witness by using somebody else's report.

"[DEFENSE COUNSEL]: I'm just asking –

"THE COURT: That's my ruling."

Although the record does not expressly divulge the Evidence Code sections on which counsel and the court relied, we infer from the foregoing colloquy that Garcia's counsel sought to use the officer's report on the authority of Evidence Code section 771[5] (present recollection refreshed) and that the court prohibited him from doing so on the authority of Evidence Code section 1237[6] (past recollection recorded). "A witness may refer to hearsay to refresh his [or her] recollection; however, before doing so the witness

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[5] Evidence Code section 771: "(a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken. [¶] (b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness. [¶] (c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing: [¶] (1) Is not in the possession or control of the witness or the party who produced his testimony concerning the matter; and [¶] (2) Was not reasonably procurable by such party through the use of the court's process or other available means."

[6] Evidence Code section 1237: "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement. [¶] (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party."

must testify he [or she] cannot remember the fact sought to be elicited. [Citation.]" (*People v. Lee* (1990) 219 Cal.App.3d 829, 840.) The attempt by Garcia's counsel to refresh her recollection was ill conceived since the witness had no failure of recollection. The court sustained the prosecutor's objection solely on the ground that someone besides the witness wrote the report.

With regard to past recollection recorded, the Evidence Code requires the writing be "made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made," but with regard to present recollection refreshed the Evidence Code imposes no like requirement. (Evid. Code, § 1237; cf. Evid. Code, § 771.) "It should be noted that there is no restriction in the Evidence Code on the means that may be used to refresh recollection. Thus, the limitations on the types of writings that may be used as recorded memory under Section 1237 do not limit the types of writings that may be used to refresh recollection under Section 771." (Cal. Law Revision Com. com., Deering's Ann. Evid. Code (1986 ed.) foll. § 771, p. 400.) Although the court gave the wrong reason for ruling correctly on the prosecutor's objection, a ruling that is correct for the wrong reason will not be disturbed on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 272.) The court's ruling was not error, so Garcia's confrontation clause argument fails for want of a valid premise.

Even assuming error arguendo, Garcia fails to show prejudice. First, since two eyewitnesses identified him as the person who fired the shotgun blasts, the testimony of each was cumulative to the testimony of the other. Second, although he argues the officer's report "showed [the witness] had told investigating officers she could not even provide a description of the suspect," he cites to nothing in the record to support his argument. "One asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient." (*People v. Johnson* (1988) 47 Cal.3d 576, 591; cf. Cal. Rules of Court, rule 14(a)(1)(C) ["Each brief must: [¶] … [¶] support any reference to a matter in the record by a citation to the record"].)

2. *Juvenile Disposition*

Garcia argues a remand for resentencing is necessary for the court to receive in evidence, read, and consider a social study by the probation officer before the exercise of discretion to impose an adult sentence or order a juvenile disposition. The Attorney General argues the court lacks that discretion and, even if the court had that discretion, a result more favorable to Garcia would not be reasonably probable since the court already considered and rejected a juvenile disposition.

Several questions about whether a court has discretion to order a juvenile disposition after a Proposition 21 discretionary direct file are pending before the Supreme Court. (See *People v. Thomas* (2003) 109 Cal.App.4th 1520, review granted October 1, 2003, S118052; *People v. Chacon* (2003) 109 Cal.App.4th 1537, review granted October 1, 2003, S117879.) Here, on a record showing the court's consideration on the merits of Garcia's request for a juvenile disposition, we assume arguendo the court has that discretion.[7]

The narrow question the record here poses is whether Penal Code section 1170.19, subdivision (a)(4) requires the court to receive in evidence, read, and consider a social study by the probation officer prior to imposing an adult sentence on a Proposition 21 discretionary direct file. The language of the statute answers that question in the negative:

> "Subject to the knowing and intelligent consent of both the prosecution and the person being sentenced pursuant to this section, the court may order a juvenile disposition under the juvenile court law, in lieu of a sentence under this code, upon a finding that such an order would serve the best interests of justice, protection of the community, and the person being sentenced.

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[7] This case does not present, and we do not address, the issue of whether the statutory requirement of the prosecutor's consent to a juvenile disposition violates the separation of powers doctrine. (See Pen. Code, § 1170.19, subd. (a).) The court considered Garcia's request on the merits without adjudicating that issue. On appeal, neither party raises that issue.

> *Prior to ordering a juvenile disposition*, the court shall cause to be received into evidence a social study by the probation officer, prepared pursuant to Section 706 of the Welfare and Institutions Code, and shall state that the social study made by the probation officer has been read and considered by the court." (Pen. Code, § 1170.19, subd. (a)(4), italics added.)

Penal Code section 1170.19, subdivision (a)(4) incorporates by reference Welfare and Institutions Code section 706, which requires the court to receive in evidence, read, and consider a social study by the probation officer after a Welfare and Institutions Code section 601 or 602 finding:

> "*After finding that a minor is a person described in Section 601 or 602*, the court shall hear evidence on the question of the proper disposition to be made of the minor. The court shall receive in evidence the social study of the minor made by the probation officer and any other relevant and material evidence that may be offered, including any written or oral statement offered by the victim, the parent or guardian of the victim if the victim is a minor, or if the victim has died or is incapacitated, the victim's next of kin, as authorized by subdivision (b) of Section 656.2. In any judgment and order of disposition, the court shall state that the social study made by the probation officer has been read and that the social study and any statement has been considered by the court." (Welf. & Inst. Code, § 706, italics added.)

Here, the prosecutor's choice of a Proposition 21 discretionary direct file necessarily obviated a "finding that [Garcia] [was] a person described in Section 601 or 602." (Welf. & Inst. Code, § 706; see Proposition 21.) Since Welfare and Institutions Code section 706 was adopted and amended before Proposition 21 and neither amended by or after Proposition 21, the statute cannot possibly, and indeed does not, impose a requirement that the court receive in evidence, read, and consider a social study by the probation officer prior to imposing an adult sentence on a Proposition 21 discretionary direct file. (Added by Stats. 1961, ch. 1616, § 2. Amended by Stats. 1976, ch. 1068, § 50; Stats. 1995, ch. 234, § 3.) Again, the language of the statute answers in the negative the question before us.

The "fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*People v. Cruz* (1996) 13 Cal.4th 764, 774-775.) If the language is clear, the plain meaning of the words is determinative, and there is ordinarily no need to look beyond the statute itself. (*People v. Benson* (1998) 18 Cal.4th 24, 30.) Since the language of both Penal Code section 1170.19, subdivision (a)(4) and Welfare and Institutions Code section 706 is clear that the court has no duty to receive in evidence, read, and consider a social study by the probation officer prior to imposing an adult sentence on a Proposition 21 discretionary direct file, we have no need to look beyond the statutory language.

"Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8, quoting *United States v. Tucker* (1972) 404 U.S. 443, 447; see *Townsend v. Burke* (1948) 334 U.S. 736, 741; *People v. Austin* (1981) 30 Cal.3d 155, 160-161.) Here, the court carefully considered facts about Garcia and his crimes and thoughtfully evaluated criminal and juvenile dispositions alike before exercising informed discretion to impose an adult sentence. On that record, the court did not err in making that sentencing decision without having received in evidence, read, and considered a social study by the probation officer.

3. *Sentence Modification**

Although a person with a sentence of life with possibility of parole for attempted willful, deliberate, and premeditated murder generally receives a seven-year minimum eligible parole date (MEPD) (Pen. Code, §§ 664, subd. (a), 3046, subd. (a)(1)), a person with a life sentence and a criminal street gang enhancement receives not the consecutive 10-year term in the criminal street gang statute but a 15-year MEPD instead (*People v. Montes* (2003) 31 Cal.4th 350, 361, fn. 14; *People v. Harper* (2003) 109 Cal.App.4th

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***** See footnote, *ante*, page 1.

520, 525-527; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1228-1229; compare Pen. Code, § 186.22, subd. (b)(1)(C) [10-year enhancement] with Pen. Code, § 186.22, subd. (b)(5) [15-year MEPD]). Garcia argues, the Attorney General agrees, and we concur that the term of 15-to-life for attempted willful, deliberate, and premeditated murder with a consecutive 10-year criminal street gang enhancement is not an authorized sentence and that modification of the judgment is necessary to strike those terms and to impose instead a term of life with possibility of parole and a 15-year MEPD. We will order modification of the judgment accordingly.

DISPOSITION

We affirm the judgment and remand to the superior court to modify the judgment by striking not only the 15-to-life term for attempted willful, deliberate, and premeditated murder but also the consecutive 10-year criminal street gang enhancement and by substituting a term of life with possibility of parole and a 15-year minimum eligible parole date. The superior court shall issue and forward to the appropriate persons an amended abstract of judgment reflecting those changes. Garcia has no right to be present at those proceedings. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.)

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Gomes, J.

WE CONCUR:

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Harris, Acting P.J.

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Dawson, J.